

**United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local No. 639 and Summit, Medina & Portage Counties, District Council of Carpenters and American Modulares Corporation, a wholly owned subsidiary of United States Steel Corp. Case 8-CC-573**

June 4, 1973

## DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING AND JENKINS

On February 9, 1973, Administrative Law Judge James V. Constantine issued the attached Decision in this proceeding. Thereafter, Respondents, the Charging Party, and counsel for the General Counsel filed exceptions and supporting briefs to the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and finds merit in some of the exceptions as hereinafter discussed. Accordingly, the Board affirms the Administrative Law Judge's rulings, findings, conclusions, and recommendations only to the extent consistent herewith.

The complaint alleged that Respondents violated Section 8(b)(4)(i) and (ii)(B) of the Act. Although the Administrative Law Judge found several violations of Section 8(b)(4)(i) and (ii)(B) by Respondents,<sup>1</sup> he failed to find that Respondents' picketing prior to September 20 and after October 11, 1972, violated the Act. In reaching this conclusion, the Administrative Law Judge reasoned that, since after this date Respondents confined their picketing to the gate reserved for Sondles, the failure to indicate on the picket

signs the identity of the employer with whom Respondents had a dispute was without legal consequence.

We disagree. In *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547, we established criteria intended to help resolve the question of whether a union has the proscribed object of enmeshing neutral employers when it pickets a common situs. One of the criteria set forth by the *Moore Dry Dock* decision is that the picketing clearly establishes that the dispute is with the primary employer. In the instant case, however, Respondents' picketing never made clear that the dispute was with Sondles. In these circumstances, we are constrained, therefore, to conclude that Respondents' picketing violated Section 8(b)(4)(i) and (ii)(B) from September 15, 1972, when picketing commenced, until December 25, 1972, when picketing was enjoined.

## CONCLUSIONS OF LAW

Delete Conclusions of Law 3 and 6 in the Administrative Law Judge's Decision and insert the following:

"3. By picketing on and after September 15, 1972, at the jobsite with an object of (a) forcing or requiring American Modulares to cease doing business with Sondles, and (b) forcing or requiring Keller, Lockhart, and Thompson to cease doing business with American Modulares, Respondents have engaged in an unfair labor practice comprehended by Section 8(b)(4)(i) and (ii)(B) of the Act."

## ORDER

Respondents, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local No. 639 and Summit, Medina & Portage Counties, District Council of Carpenters, each, and their respective officers, agents, and representatives, shall:

### 1. Cease and desist from:

(a) Inducing or encouraging, by picketing or any other means, individuals employed by American Modulares, Keller, Lockhart, or Thompson or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of their employment to perform services for their respective employers, where an object thereof is to force any person to cease doing business with Dave Sondles or to force or require Keller, Lockhart, and Thompson at the Sherwood Acres jobsite, Stow, Ohio, to cease doing business with American Modulares.

(b) Threatening, coercing, or restraining American Modulares, Keller, Lockhart, or Thompson where an object thereof is to force or require American Modulares to cease doing business with Dave Sondles.

<sup>1</sup> Like the Administrative Law Judge, we find that the statement of Respondents to American's area manager concerning the possibility of "informational" picketing at the Sherwood jobsite unless the latter's subcontractor, Sondles, the primary employer herein, became unionized, constituted a threat within the meaning of Sec. 8(b)(4)(ii)(B). This statement, by its breadth, contemplated picketing of the entire jobsite and anyone working there, whether connected with the primary or neutral persons or employers. As such, it went beyond the mere giving notice of prospective picketing against a subcontractor to the general contractor. Cf. *Construction, Building Material and Miscellaneous Drivers Local Union No. 83, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind. (Marshall and Haas)*, 133 NLRB 1144, 1146.

Although the Administrative Law Judge found that Respondents' picketing had as an object forcing or requiring subcontractors Keller, Lockhart, and Thompson to cease doing business with American, he inadvertently failed to provide a remedy for them in his recommended Order. Inasmuch as we agree with his findings in this respect, we shall amend the Order to provide an appropriate remedy.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post at each Respondent's business office, meeting halls and all other places where notices to members are customarily posted, copies of the attached notice marked "Appendix."<sup>2</sup> Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by an authorized representative of each Respondent, shall be posted by each Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by each Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the Regional Director for Region 8 for posting by the Employers named in the preceding paragraph, if they are willing, at all places where notices to their respective employees are customarily posted.

(c) Notify the Regional Director for Region 8, in writing, within 20 days from date of the Order, what steps Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

<sup>2</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT induce or encourage, by picketing or any other means, individuals employed by American Modulares Corporation, Richard Keller, H. B. Lockhart Construction Co., Inc., or Thompson Plumbing & Heating, Inc., or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal to perform services for their respective employers, where an object thereof is to force or require any person to cease doing business with Dave Sondles or to force or require Richard Keller, H. B. Lockhart Construction Co., Inc., and Thompson Plumbing & Heating,

Inc., at the Sherwood Acres jobsite, Stow, Ohio, to cease doing business with American Modulares Corporation.

WE WILL NOT threaten, coerce, or restrain American Modulares Corporation, Richard Keller, H. B. Lockhart Construction Co., Inc., or Thompson Plumbing & Heating, Inc., where an object thereof is to force or require said American Modulares to cease doing business with Dave Sondles.

UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS  
OF AMERICA, AFL-CIO,  
LOCAL No 639  
(Labor Organization)

Dated \_\_\_\_\_ By \_\_\_\_\_ (Representative) \_\_\_\_\_ (Title)

SUMMIT, MEDINA, & PORTAGE COUNTIES, DISTRICT  
COUNCIL OF CARPENTERS  
(Labor Organization)

Dated \_\_\_\_\_ By \_\_\_\_\_ (Representative) \_\_\_\_\_ (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1695 Federal Office Building, 1240 East Ninth Street, Cleveland, Ohio 44199, Telephone 216-522-3715.

## DECISION

### STATEMENT OF THE CASE

JAMES V. CONSTANTINE, Administrative Law Judge: This is an unfair labor practice case commenced under the provisions of Section 10(b) of the National Labor Relations Act, herein called the Act. 29 U.S.C. 160(b). It was initiated by a complaint issued on October 17, 1972, by the General Counsel of the National Labor Relations Board, herein called the Board, through the Regional Director for Region 8 (Cleveland, Ohio). It names United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local No. 639, and Summit, Medina & Portage Counties, District Council of Carpenters, as Respondents. That complaint is based on a charge filed on September 22, 1972, against said Local No. 639, and an amended charge filed on October 6, 1972,

against said Local and said District Council, by American Modulares Corporation, a wholly owned subsidiary of United States Steel Corporation.

In substance said complaint alleges that Respondents violated Section 8(b)(4)(i) and (ii)(B), and that such conduct affects commerce within the meaning of Section 2(6) and (7) of the Act. Respondents have answered, admitting some allegations of the complaint but putting in issue that they committed any unfair labor practices.

Pursuant to due notice this cause came on to be heard, and was tried before me, at Akron, Ohio, on November 7, 1972. All parties were represented at and participated in the trial, and had full opportunity to introduce evidence, examine and cross-examine witnesses, submit briefs, and offer oral argument. Briefs have been received from all parties.

This case presents the following issues:

(1) Whether Respondents have threatened, coerced, and restrained American Modulares and other secondary employers with an object of forcing or requiring American Modulares to cease doing business with Dave Sondles.

(2) Whether Respondents have picketed a jobsite of American Modulares in a manner constituting an illegal secondary boycott.

(3) Whether Respondents orally induced employees of secondary employers at said jobsite to cease working for their respective employers in a manner constituting an illegal secondary boycott.

Upon the entire record in this case, and from my observation of the demeanor of the witnesses, I make the following:

#### FINDINGS OF FACTS

##### I. AS TO JURISDICTION

American Modulares Corporation, herein called American (a wholly owned subsidiary of United States Steel Corporation), an Ohio corporation, is engaged in building construction at various places, including a jobsite in Stow, Ohio. The value of the latter jobsite exceeds \$1 million. During the year 1972, American received products valued in excess of \$50,000 at said jobsite directly from points outside the State of Ohio.

U. S. Steel Corp., American's parent, a Delaware corporation engaged in manufacturing steel and related products annually ships products valued in excess of \$50,000 directly to points in Ohio from its plants in Pennsylvania.

Dave Sondles is an individual engaged in the carpentry business doing business as Dave Sondles Construction Co. He is a subcontractor at said jobsite.

Richard Keller, another subcontractor at said jobsite, does business as an electrical contractor under the trade name of Keller Electric Co.

H. B. Lockhart Construction Co., Inc., an Ohio corporation engaged in the business of heavy construction service, annually performs services valued in excess of \$500,000. It was paid in excess of \$50,000 in 1972 by American for services performed at said jobsite.

Thompson Plumbing & Heating, Inc., an Ohio corporation engaged in the business of installing sanitary plumbing and hot water and steam furnaces, is a subcontractor at said Stow jobsite.

I find that American, Sondles, Keller, Lockhart, and Thompson are employers within the meaning of Section 2(2), and are engaged in commerce or in an industry (i.e., the building and construction industry) affecting commerce within the meaning of Section 2(6) and (7), of the Act. *Michael Palumbo d/b/a American Homes Systems*, 200 NLRB No. 158.

##### II. THE LABOR ORGANIZATIONS INVOLVED

Local No. 630 and the District Council each is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE UNFAIR LABOR PRACTICES

###### A. Stipulated Facts

At the trial the parties stipulated the facts recited in this subsection.

American is engaged in erecting single family residences in Stow, Ohio, herein called the jobsite. In April 1972, American awarded Sondles a contract to perform rough carpentry work at said jobsite. American also entered into subcontractual agreements for work at said jobsite by Keller, Lockhart, Thompson, and about 16 other contractors.

Neither Respondent has been certified to represent the employees of Sondles or of any other employers named above. However, at all times material, such Respondents have had a contract with Lockhart covering its carpenters. Since August 15, 1972, Respondents have attempted to organize the employees of Sondles, but at no time have they sought to organize the employees of American, Keller, Lockhart, or Thompson.

On August 28, 1972, James F. Bailey, executive secretary-treasurer of Respondent District Council, came to the jobsite to speak to Charles E. Stump, area manager of general contractor American. The conversation was chiefly about Sondles. Bailey stated that he knew Dave Sondles and that he was sure that if American talked to Sondles it could get Sondles to join the Carpenters Union. Bailey explained that the alternative to Sondles' not joining the Union would be "informational" picketing of the Sherwood Acres jobsite. He stated that his objective was to get Dave Sondles to join the Union and explained to Stump what he believed to be the various advantages of being unionized. There was some discussion as to whether other general contractors in the area employed union carpenters, and concerning some compromise which could be reached. It is obvious that the Union's central concern was that Sondles had not executed a contract with it covering his employees. (See Joint Ex. 1.)

On or about September 7, 1972, Jack Scott, business representative of Local No. 639, visited the jobsite to speak to American's area manager, Charles Stump, accompanied by a representative of another union. There was a discussion concerning efforts Bailey was making to contact Sondles, as well as a general discussion concerning bidding by union contractors at this jobsite.

Shortly before 8 a.m. on Friday, September 15 1972, pickets were observed at the jobsite parking lot and Sherwood drive entrances carrying signs reading as follows:

Picket, Protest—Unfair; Doing work under the Juris-

diction of Summit-Portage Medina District Council of Carpenters; does not employ workmen under the terms of a collective bargaining agreement with Summit-Portage-Medina District Council of Carpenters; workmen and deliverymen are not requested to honor this picket; do not talk to picket.

It should be noted that all entrances to this jobsite start from Fish Creek Road in the Stow, Ohio, area. Also, the parties agree that Exhibit A is a marked copy of the relevant portion of the recorded plat showing the entrances involved. (Said Exh. A is attached to Joint Exh. 1.)

On September 19, Stump, pursuant to the instructions of his attorney, notified Respondent District Council, by telegram that a separate entrance for Sondles had been established, gave the location of this entrance, and requested the Union to restrict their picketing to the Sondles entrance. On September 20, 1972, a sign was posted by American at the entrance reserved for the use of Sondles, stating that it was reserved for the exclusive use of Sondles and its employees, and stating that no other company was to use this entrance.

On September 20, 1972, signs were also posted at two other entrances to the jobsite, stating that these entrances were to be reserved for the exclusive use of companies and employees named therein, other than Sondles. This latter sign included the names of the subcontractors referred to above, namely, Keller, Lockhart, and Thompson. This sign concluded with the statement: "Employees of Sondles Construction Co. may not use this entrance."

Despite the posting of the signs, the picketing by Respondents was continuous from September 15 to Wednesday, October 11, 1972, at virtually all entrances, including the entrance described above (i.e., the non-Sondles entrances) at which time the pickets were removed to the entrance described above as the Sondles entrance. Respondents then ceased picketing all other entrances to this jobsite. Since Thursday, October 12, 1972, the employees of Keller, Lockhart, and Thompson, as well as the employees of other necessary subcontractors, have worked at the jobsite without apparent incident. On certain days during the period from September 20 to October 11, 1972, inclusive, the picketing described above resulted in employees of certain employers, for example, Lockhart, Keller, and Thompson, refusing to enter upon the premises of American and perform services for American.

Further, the parties stipulate that, in the construction of homes at Sherwood Acres, American, alone, has the following relevant contracts for the purchase of materials:

1. *Crystal Park Lumber Co., Inc.*

American purchases decks, trusses, roof sheeting, exterior doors, exterior and interior wood trim, and stairs.

2. *United States Steel Homes Division*

American purchases exterior and interior wall panels and soffit.

3. *J. P. Loomis Co.*

American purchases concrete block and concrete window sills.

4. *Akron Sales Co.*

American purchases brick.

5. *Ornamental Iron Works*

American purchases steel I-beams.

In the following described fashion the below-listed em-

ployers work with the above materials:

1. *W. B. Miller Construction Co.*

a. Foundation—concrete block walls

b. Exterior walls—brick

c. Window Sills

2. *Sondles*

Erects the house shell using;

a. Steel I-beams

b. Decks

c. Pre-fab walls—wall panels

d. Trusses

e. Roof sheeting

f. Exterior doors and trim

3. *Alside*

Places soffit under eaves

American has a contract with Alside Builders Service Company Akron (Alside) for the installation of aluminum siding, soffit, and downspouts. Alside has no employees on the job in question. Alside has subcontracts with others for the above work. The relationship, if any, between these subcontractors and Respondents is not known to American, Sondles, or the Petitioner. Respondents' witness would testify that the subcontractors of Alside are not currently covered by a collective-bargaining agreement with Respondents and that this work is normally performed by members of the carpenter trade.

It is further stipulated that Crystal Park, U.S. Steel Homes, J. P. Loomis, Akron Sales Co., Ornamental Iron Works, Lockhart, Keller, Thompson, McQuillen Roofing & Siding Co., subcontractors of Alside, and W. B. Miller Construction Co., have on and after September 20, 1972, used exclusively the entrances described above; i.e., the non-Sondles entrances. It is also stipulated that all deliveries of materials to the immediately aforementioned companies have been through the entrance described above; i.e., the non-Sondles entrances.

American has a contract with McQuillen for the installation of roof shingles. Such work is normally performed by the carpentry trade and McQuillen does not have a collective-bargaining agreement with Respondents.

The foregoing stipulated facts are taken from Joint Exhibit 1.

### B. General Counsel's Evidence

David Sondles testified in substance as follows. In mid-April 1972, he successfully bid to do carpentry work on the jobsite in Stow, Ohio, and began work in the first week of May 1972. He employed an average crew of five men on that job, but at times used as many as seven. The foreman thereon is his brother, Ronald.

About August 15, 1972, Business Agent Jack Scott of Local No. 639 asked Sondles "if we wanted to join the union." Sondles replied, "Not at this time." Scott promised to return in a couple of weeks.

On or about September 11, Scott returned to the jobsite again spoke to Sondles. Scott offered a "special deal" in effect at the time whereby Scott "would take the whole crew . . . and all [Sondles] would have to pay is \$100 per man instead of the normal fees." Sondles replied that he did not want to join the Union and that Scott's offer was not a good

deal for the men. As he left, Scott observed that if it were up to him he "would picket the area," gave Sondles the business card of James Bailey, secretary-treasurer of the District Council (see G. C. Exh. 2), and told Sondles "this is the man you must talk to then."

Picketing began at the jobsite on September 15, 1972. On September 19, 1972, American Modulares posted a gate which was reserved exclusively for the use of employees of Sondles. Sondles then notified his employees to use only said reserved gate at all times. In addition, Sondles warned those hired since then to use only said gate in entering and leaving the jobsite. However, on September 25, Sondles left the site from another gate at about 7:10 a.m. because he saw no pickets there; but when he returned at 8 a.m. he entered by the reserved gate. At all times Sondles believes his men used only the reserved gate, including during the lunch hour.

Ronald Sondles, the brother of Dave Sondles, gave testimony substantially as set forth at this point. On or about September 12, 1972, James Bailey and another man, Jack Scott, spoke to Ronald in the presence of Dave Sondles and employees Deaton and Mulroony. Bailey gave Ronald the former's business card and asked Ronald to have Dave call Bailey. Ronald did give it to Dave.

After the picket signs were put up on or about September 15, 1972, Dave told Ronald and the others employed by Dave that they were to use the Sondles entrance to come into and leave the jobsite and that they were not to use any other entrances at all.

Since September 19, Dave observed that no employees of Sondles entered or left the jobsite by any other exit or entrance. However, Dave worked elsewhere, at a Hartville jobsite, from about October 16 and 20 to about October 30.

William Deaton, an employee of Dave Sondles, testified that on or about September 19, 1972, Sondles instructed his employees working at the jobsite to use only the Sondles "exit" there and "not to use any other exits" at such site. Deaton not only followed this command, but he claimed that after September 19 "we [the employees of Sondles] all used [this] same entrance and exit," and did not use any other entrance or exit there. Further, Deaton asserted he saw no employees of other employers use the gate reserved for employees of Sondles.

Gary Deaton and Michael Mulroony, other employees of Sondles at the jobsite, corroborated William Deaton's foregoing testimony. And Ronald Holesovsky, who was hired by Dave Sondles to work at the jobsite since October 1, 1972, testified that Sondles directed him, in the presence of other Sondles employees, to use only his entrance to the jobsite and not to use any other means of ingress or egress there. Holesovsky obeyed said instructions.

### *C. Respondent's Defense*

James F. Bailey, secretary-treasurer of Respondent District Council, visited the jobsite the last Monday of August 1972. At that time he spoke to Charles Stump, area manager of American Modulares. Their conversation is set forth in the above-stipulated facts and need not be repeated here.

As executive secretary of said District Council, Bailey instructed his pickets at the jobsite to take down the license

numbers of cars "going through the separate gates." Said pickets then gave him a "list of license numbers which have crossed the various sites" at the construction jobsite.

Jack Scott, business representative of Respondent Local No. 639, denied that he spoke to Dave Sondles about August 15 and September 11, 1972, as Sondles testified, or that he ever met Sondles on those dates. Further, Scott testified that he has his own business card, but that he never carried James Bailey's business card. However, Scott asserted that he first met Sondles about October 4, 1972, at the Holiday Inn in Akron, Ohio, at a meeting also attended by S. G. Clark, an attorney for U.S. Steel, Frank Motil, an attorney for the General Counsel, and Ray Sheppard, counsel for the Respondents. Finally, Scott testified that U.S. Steel was invited "to the meeting of the building trades to discuss the meeting of the subcontractors," but said building trades never received a reply thereto.

Another witness for Respondents, Wesley Ward, a member of Local No. 639, did some picketing for Respondents at the jobsite. As such picket he was instructed to take down the license numbers of cars and trucks going through the various gates at Sherwood Acres. Pursuant to such instructions he obtained the license numbers of vehicles entering and leaving the various gates there. On October 24, 1972, vehicles bearing tags numbered 914879, 4N9815, and D78S passed through Gate P17 which is identified on Joint Exhibit 1. This has been stipulated as the Sondles entrance. (See pa. 17 of Joint Exh. 1.) On October 25, vehicles numbered D78S, 7K783, 4N541, C177Y, and 50H52 went through the non-Sondles entrance identified as Gate P18 on said Joint Exhibit 1.

Continuing, Ward on October 26 observed vehicles displaying licenses numbered E1136G, 4N5729, and 4W1025 pass through Gate P17 and E1158C through Gate P18. On October 27, vehicles registered as 4W1025, 5D2847 (Marks Concrete Contractor), D78S, and E1136G went through Gate P17, and 20H25 through Gate P18, according to Ward. Then, on October 30, trucks carrying plates numbered 10M348, 5D9577, 5D2847, 5D2848, 10U922, and 6K770 passed through Gate P18.

On October 31, 4W1025, FF4038, and 4W0135 went in by Gate P17, and 5D848 entered by Gate P18. On November 1, 10N348 and 4N63538 entered through Gate P18, and 4W1025, D78S, 4038, and 4W3915 used Gate P17. Then, on November 2, D78S, FF4038, 4W1025, and 4N9915 went through Gate P17, while 5D2847 and three other trucks used Gate P18.

Continuing, Ward asserted that, on November 3, 4N9915, D78S, 4W1025, and FF4038 used Gate P17, whereas 4BB254, 4N6538, and 4B838 used Gate P18. Then on November 6 FF4037, D78S, and E1136G used Gate P17 and Keller Electric and Akron Sales Company made use of Gate P18. On November 7, the date this case was tried, Gate P18 was used by vehicles from United Insulation, Keller Electric, Thompson Plumbing, Marks Concrete, Horning Concrete, and Lockhart. In addition, Ward observed an operating engineer employed by Lockhart use Gate P18, i.e., the non-Sandles gate, in October, and saw other trucks enter through Gate P17.

Finally, Ward testified that he noticed that Dave Sondles "has gone through in and out of every gate up there."

#### D. General Counsel's Rebuttal Evidence

A partner in the firm of Marks Concrete Construction is Joseph Marks. He testified substantially as follows. His firm in general poured the concrete necessary to construct the homes at the jobsite, beginning such performance in April 1972. Charles Stump, project manager at the jobsite, informed Marks about October 19, 1972, that a specific gate had been reserved for Sondles and that Marks should instruct his employees to use any other gate than that set aside for Sondles. Stump also pointed out the location of the Sondles gate to Marks.

Thereafter Marks told his foreman to use any gate except the Sondles entrance, and to pass on this instruction to the employees of Marks. The foreman "went on to instruct the employees." However, Marks also told the employees himself. Marks has not since then used the Sondles entrance. Nor has Marks in the seven or eight times he has been on the jobsite since then detected any of his employees using the Sondles entrance. And Marks' superintendent at the jobsite, Jack Miller, never reported to Marks that his employees ever used the Sondles entrance.

The president of H. B. Lockhart Construction Company, Hugh Boyd Lockhart, testified also. A conspectus of his testimony follows. About September 20, 1972, Charles Stump told Lockhart that a separate drive had been set aside at the jobsite for employees of Sondles only, and that all other employees should use the other gates or drives. A few days later Lockhart instructed his supervisors that only the non-Sondles drives should be used and that Lockhart's employees (168 in number) should be so advised. This was accomplished.

The employee of Lockhart, Rienhart, referred to by Respondents' witness, Ward, as having entered the jobsite by the Sondles gate was not working at the time. But Rienhart actually entered by a proper gate and left by the Sondles gate. On another occasion a Lockhart employee entered properly but went out by the Sondles gate.

#### E. Concluding Findings and Discussion

In arriving at the findings set forth below, I have been guided by, and have observed, certain well-established applicable principles of law. Thus, I recognize that the burden of proof is upon the General Counsel to establish the allegations of the complaint and that this burden never shifts. Secondly, even though I may not credit some of Respondents' evidence, this will not aid the General Counsel. This is because the General Counsel must prove his case by affirmative evidence and reasonable inferences drawn therefrom; and discrediting evidence of Respondents does not constitute such affirmative evidence. "Negative evidence alone cannot supply the proof which must underlie the [Board's] order if it is to stand." *Portable Electric Tools, Inc. v. N.L.R.B.*, 309 F.2d 423, 426 (C.A. 7, 1962). And, finally, I expressly rule that no burden is imposed on Respondents to disprove any of the allegations of the complaint, because the General Counsel must prove said allegations. *Council of Bagel and Bialy Bakeries*, 175 NLRB 902, 903.

Two defenses of Respondents may be disposed of at this point. They are that (a) American Modulars is a primary

employer; and (b) in any event American is not a neutral employer, but, instead, is an ally of Sondles, an admitted primary employer, because American "purchases supplies and materials for Sondles which are then installed by Sondles' employees . . . and particularly so since [American] permits deliveries of these supplies and materials through the neutral gates." (See pp. 5 and 6 of brief for Respondents.) However, on the record unfolded at the hearing I am of the opinion, and find, that neither of these defenses is well taken.

The record fails to demonstrate that American is a primary employer. Patently nothing in the stipulated facts and the evidence distinguishes this case from the usual case of a relationship between a general contractor and his subcontractor. In such cases, the Board and courts have held that when a subcontractor and a union have a primary dispute the general contractor under such circumstances is a secondary, and not a primary, employer. *N.L.R.B. v. Denver Building and Construction Trades Council [Gould & Preisner]*, 341 U.S. 675, 689-690 (1951).

Nor does the record warrant the conclusion, pressed upon me by Respondents, that American is an ally of Sondles because American purchased the supplies and materials installed by Sondles at the jobsite. Such a relationship does not, without more, render American an ally of Sondles, and I so find. *United Brotherhood of Carpenters and Joiners of America, AFL-CIO; et al. (J. G. Roy and Sons Company)*, 120 NLRB 1016. Hence I find that this defense does not defeat the General Counsel's case.

A careful evaluation of the entire record convinces me, and I find, that Respondents (a) on and after September 20, 1972, picketed gates or entrances set aside at the jobsite for the exclusive use of employers other than Sondles, and (b) threatened to engage in such picketing, where an object of such conduct in (a) and (b) was to force or require American to cease doing business with Sondles. Further, I find that the object of the conduct described in (a) was also that of forcing or requiring Keller, Lockhart, and Thompson to cease doing business with American. And I further find that such acts with such objects are proscribed by Section 8(a)(4)(i) and (ii)(B) of the Act. While this ultimate finding is derived from the entire record, it is also based on the following subsidiary findings which I hereby find as facts.

1. Respondents had a primary dispute with Sondles in attempting to organize his employees and "get him to join the carpenters union." In furtherance of that dispute, Respondents told American that the "alternative" to unionizing Sondles would be "informational picketing of the Sherwood Acres job site." (See par. 14 of the stipulated facts in Joint Exh. 1.) I find that this statement constitutes an aim to picket the jobsite if Sondles and his employees did not become members of Local No. 639, and that such intent is comprehended by Section 8(b)(4)(ii)(B) of the Act proscribing Respondents from threatening, coercing, or restraining American for an illegal object. "A threat to picket is itself coercive." *General Teamster, Warehouse and Dairy Employees Union Local No. 126; et al. (Ready Mixed Concrete, Inc.)*, 200 NLRB No. 41, fns. 2 and 6. The finding relating to "object" is set forth later in this Decision.

However, I find that said intent to picket did not threaten, coerce, or restrain any other neutral employer at the jobsite,

including Keller, Lockhart, and Thompson, because neither the stipulated facts nor the testimony indicates that such intent was in any way communicated to any employer other than American. Accordingly, I find no proscribed threat, coercion, or restraint within the meaning of Section 8(b)(4)(ii)(B) of the Act was conveyed to any employer other than American.

2. It is my opinion, and I find, that the picketing of the non-Sondles gates after September 20, 1972, amounted to inducement and encouragement of employees of neutral employers at the jobsite to engage in a strike or to refuse to perform services in the course of their employment. Patently picketing is a form of inducement and encouragement within the contemplation of Section 8(b)(4) of the Act. And, as found hereinafter, an object of such picketing is unlawful. Hence I find that such picketing of the non-Sondles gates violates the Act.

3. It is true that at a common situs where both primary and neutral second employers are engaged in undertaking work a union may picket the primary employer at such a situs provided the union complies with specific conditions delineated in *Sailors' Union of the Pacific (Moore Dry Dock Company)*, 92 NLRB 547, 549. Accord, *Ready Mixed Concrete, Inc.*, *supra*. Nevertheless, even at a common situs a union may not picket a gate reserved exclusively for employees of neutral secondary employers, but must confine its picketing to the gate set aside solely for employees of the primary employer. *Local 761, Intl. Union of Electrical, Radio and Machine Workers, AFL-CIO (General Electric Company, Appliance and Television Receiver Division)*, 123 NLRB 1547, as modified by the Supreme Court in 366 U.S. 667, 680-682 (1961), and as decided on remand in 138 NLRB 342.

4. However, if employees of the primary employer use a gate reserved exclusively for employees of neutral employees then the protected character of said gate vanishes and the union having a dispute with the primary employer may with impunity picket said reserved gate. Respondents insist that this principle is operative here because Dave Sondles and at least one of his employees used the gates reserved for neutrals. But I do not credit this evidence offered by Respondents.

I am unable to credit Respondents' witness, Ward, that Dave Sondles "has gone through in and out of every gate up there." One reason is that, although Ward kept extensive and detailed notes on every vehicle entering and leaving the various gates, he failed to furnish a single written note concerning Sondles. In my opinion this is significant and may not be disregarded. In any event, I credit Sondles that he always, except once, used the Sondles gate; and that once on September 25, but not during working hours, he left the jobsite from a non-Sondles gate. Since this occurred before the 8 a.m. starting time of work, I consider it innocuous, and, therefore, find that it did not cause the gate reserved for employees of neutral employers to lose its protected attribute.

Ward also testified that an employee of Sondles drove a car displaying tag number D785 through the non-Sondles gate on October 25. At most this is an isolated instance during working hours which does not render said gate subject to picketing by Respondents.

Accordingly, I find that the non-Sondles gates were not used by Sondles or any of his employees in a manner to subject them to picketing, and, therefore, picketing of the non-Sondles gates constituted the kind of inducement and encouragement of employees of neutral employers proscribed by Section 8(b)(4)(i)(B) of the Act.

5. However, Ward testified that many trucks of neutral employers used the gate reserved for Sondles and his employees, i.e., gate P17 on the diagram attached to Joint Exhibit 1. Since Ward confirmed this testimony by written notes executed contemporaneously with said events, I credit him. Of course, his action in writing down the plate numbers of such vehicles is not unlawful. *Plastic Workers Local No. 929, Intl. Brotherhood of Pulp, Sulphite and Paper Mill Workers AFL-CIO, CLC (Doughboy Recreational, Domain Industries, Inc.)*, 200 NLRB No. 64.

But I find that the fact that employees of neutral employers used the Sondles gate, i.e., the gate reserved exclusively for the primary employer and his employees (see gate P17 on diagram attached to Joint Exh. 1), does not authorize Respondents to picket gate P18, i.e., the non-Sondles gates reserved for neutral employers and their employees. This is because the Respondents were lawfully picketing the primary, or Sondles, entrance regardless of who used it. By its nature an entrance set aside for a primary employer and his employees lawfully may be picketed, so that it makes no difference that others, such as neutrals, also use this gate. Consequently, I find that, by reason of said use of the gate (i.e. P17 on Joint Exh. 1) reserved exclusively for Sondles, the primary employer, by neutral employers and their employees, Respondents were not lawfully entitled to picket the gates reserved exclusively for the neutral employers and their employees, i.e., gate P18 on Joint Exhibit 1. Such picketing violates Section 8(b)(4)(i)(B) of the Act when an object thereof is to force or require neutral employers to cease doing business with other neutrals or with Sondles, the primary employer; and I so find.

6. Respondents contend that they had a primary dispute with other employers than Sondles at the jobsite. However, on the basis of the stipulated facts, I find that on the record developed before me the only primary employer involved in this proceeding is Sondles.

7. Further, I find that an object of the picketing of the non-Sondles gates is to force or require (a) American, a neutral employer, to cease doing business with Sondles, and (b) Keller, Lockhart, and Thompson to cease doing business with American. Hence, I find that the picketing of said gates is prohibited by Section 8(b)(4)(i)(B) of the Act. "Where the pressured employer [American et al] cannot himself accede to the union's wishes, the pressure is secondary because it is undertaken for its effect elsewhere." See *International Brotherhood of Electrical Workers Local Union 995, AFL-CIO (Saia Electric, Inc.)*, 201 NLRB No. 39; *Local Union No. 438, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (George Koch Sons, Inc.)*, 201 NLRB No. 7. I find that neither American nor any other neutral employer could accede to Respondents' pressure to unionize Sondles. And the fact that an object was to organize Sondles standing alone is insufficient to validate Respondents' action if it is directed at neutrals, *Saia*, *supra*.



8. The General Counsel contends that even the picketing at the gate reserved for Sondles, the primary employer, is unlawful because it does not identify the primary employer and is not restricted to such employer. But I find that this argument lacks merit. Since Respondents have a statutory privilege to picket the primary employer at his entrance, it is of no consequence that the language of the picket sign is not confined to mentioning such employer. Cf. *International Chemical Workers Union AFL-CIO and Local No. 557 (Crest, Inc.)*, 179 NLRB 168, 175-176. For, a union having a dispute with a primary employer may picket him wherever he is doing business without mentioning his name. In fact the union may even lawfully orally ask neutral employees at the site of primary picketing to honor such picketing. *N.L.R.B. v. International Rice Milling Co., Inc.*, 341 U.S. 665, 670-671 (1951); *Puerto Rico Newspaper Guild, Local 225 (El Mundo, Inc.)*, 201 NLRB No. 69. Since oral appeals to neutral employees not to cross a picket line at the scene of the primary dispute are lawful, it follows that the picket sign itself may invite neutral employees not to cross a lawful primary picket line. Consequently the fact that the picket sign at the Sondles gate may be so worded that it invites neutral employees not to go into the situs of the primary dispute through the primary gate does not transcend Section 8(b)(i)(B) of the Act. Hence it is not necessary to decide whether the picket sign used by Respondents actually requests neutral employees not to go through the gate reserved for Sondles, the primary employer.

9. Also, I find, pursuant to the stipulated fact that Bailey on August 28 told Stump "that the alternative to Sondles joining the carpeting union would be 'informational' picketing of the Sherwood Acres Jobsite," that this constitutes "to threaten, coerce, or restrain" American Modulares with an object of forcing or requiring it to cease doing business with Sondles. Hence I find that this conduct violates Section 8(b)(4)(i)(B) of the Act.

In making the foregoing findings, I have in major part sustained the allegations of the complaint. However, I additionally find that the remaining allegations of the complaint have not been proved either by the stipulated facts or the credited evidence. It follows that I shall recommend that the complaint be dismissed as to those portions of the complaint as to which I have found that the Act was not transgressed.

#### THE REMEDY

Having found that Respondents have violated Section

8(b)(4)(i) and (ii)(B) of the Act, it will be recommended that each cease and desist therefrom and that each take certain affirmative action designed to effectuate the policies of the Act. In addition, it will be recommended that Respondents be ordered to cease and desist from any secondary boycott, as defined by Section 8(b)(4)(i) and (ii)(B) of the Act, against Dave Sondles. Cf. *Building and Construction Trades Council of the Metropolitan District, et al. (Boston Gas Company)*, 137 NLRB 1299, 1305, enfd. 320 F.2d 250 (C.A. 1, 1963). On the record before me, however, I am unable to find that it may be fairly anticipated that Respondents will engage in a secondary boycott against primary employers other than Sondles. Accordingly, it will not be recommended that the Order of the Board extend the protection of the Act to primary employers other than Sondles.

Upon the basis of the foregoing findings of fact and the entire record in this case, I make the following:

#### CONCLUSIONS OF LAW

1. Local No. 639 and the District Council each is a labor organization within the meaning of Section 2(5) of the Act.

2. American Modulares, Sondles, Lockhart, and Thompson are employers within the meaning of Section 2(2), and are engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. By picketing, on and after September 20, 1972, gates reserved exclusively for neutral employers at the jobsite, with an object of (a) forcing or requiring American Modulares to cease doing business with Sondles, and (b) forcing or requiring Keller, Lockhart, and Thompson to cease doing business with American Modulares, Respondents have engaged in an unfair labor practice comprehended by Section 8(b)(4)(i) and (ii)(B) of the Act.

4. By threatening American Modulares with picketing of the jobsite with an object of forcing or requiring American to cease doing business with Dave Sondles, Respondents have engaged in an unfair labor practice proscribed by Section 8(b)(4)(ii)(B) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondents have not engaged in any other unfair labor practices as alleged in the complaint.

[Recommended Order omitted from publication.]